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IN THE

Supreme Court of the ~~United~~ States

October Term, 1994

GERALD MOSS, Ph.D., M.D.,

Petitioner,

against

HARVEY BERNARD, M.D., Individually, and in his Official Capacity as a State Participant pursuant to Public Health Law Section 230,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether a State Court determination that a medical doctor, who is a nationally and internationally recognized surgical and medical innovator, was not denied due process in professional discipline proceedings by the actions of a biased physician with vindictive motivation, on the ground that subsequent allegedly non-biased proceedings attenuated the nexus between the improper conduct and the penalty, properly could be the sole basis for a dismissal of all possible 28 U.S.C. §1983 claims against the biased physician, even those grounded in the deprivation of the medical doctor's right to substantive due process, on the rationale that the State Court determination had a preclusive effect destroying all Federal civil rights claims.

The Second Circuit held that the State Court determination did have such preclusive effect.

2. Does a State Court determination that a person was not deprived of procedural due process by a state actor in a State Administrative Proceeding provide a basis for precluding a Federal 28 U.S.C. §1983 claim, even where said claim also alleges a substantive due process deprivation that was not and could not have been determined in State Court?

The Court below implicitly answered this question in the affirmative.[1]

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[1]All parties to the proceedings below appear in the caption of this case and include the petitioner Gerald Moss, Ph.D., M.D., and the respondent Harvey Bernard, M.D., individually and in his official capacity as a state participant pursuant to New York State Public Health Law Section 230.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GERALD MOSS, Ph.D., M.D.,

Petitioner,

- against -

HARVEY BERNARD, M.D., Individually and in his Official Capacity as a State Participant pursuant to Public Health Law Section 230,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Gerald Moss, Ph.D., M.D. respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 24, 1995, affirming the Order in the United States District Court for the Northern District of New York (McAvoy, C.J.), entered May 16, 1994, dismissing the Complaint in this action.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit has not been reported. It is reprinted in the appendix hereto, p.1a, infra.

The opinion of the United States District Court for the Northern District of New York (McAvoy, C.J.) has not been reported. It is reprinted in the appendix hereto, p.10a, infra.

Jurisdiction

Petitioner Gerald Moss, Ph.D., M.D. ("Dr. Moss")brought this civil rights action pursuant to 28 USC §§1331, 1343 and 42 USC §1983. By entry of Order on February 24, 1995, the United States Court of Appeals for the Second Circuit has affirmed a final Order of the United States District Court for the Northern District of New York (McAvoy, J.), filed May 16, 1993, which granted Respondent Harvey Bernard's ("Dr. Bernard") motion to dismiss the Complaint for failure to state a claim upon which relief may be granted.

The Order was final, and the United States Court of Appeals had jurisdiction to entertain the appeal pursuant to 28 USC §1291. This Court has jurisdiction to entertain and grant a writ of certiorari pursuant to 28 U.S.C. §1254.

Constitutional and Statutory Provisions Involved

Title 42 U.S.C. Section 1983. Civil action for deprivations of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Constitution, Amendment IV. Due Process of Law.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XIV, Section 1. Due Process.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The Complaint alleges that Respondent Bernard, a physician acting as a supposedly unbiased "interviewer" pursuant to New York Public Health Law §230(10)(a)(iii), maliciously interjected himself into the professional disciplinary process against plaintiff for the sole purpose of carrying out a personal vendetta against Dr. Moss.[1]

The Complaint alleges that in his role as the interviewer, Bernard caused professional disciplinary charges to be issued against Dr. Moss. Those charges related to patients Dr. Moss had treated some 8 to 10 years earlier, and involved Dr. Moss' highly innovative practices regarding early post-operative hospital discharge and providing of nutrition.

The Committee on Professional Conduct conducted a hearing which resulted in Dr. Moss having his practice limited to consulting. In an administrative appeal, the Administrative Review Board revoked Dr. Moss' license to practice medicine in the State of New York. Dr. Moss commenced a proceeding to review that determination pursuant to Article 78 of the New York Civil Practice Law and Rules. That State Court proceeding has resulted in the loss of Dr. Moss' medical license notwithstanding the objections raised by Petitioner as to Respondent Bernard's improper involvement in the process.

During the course of the above-described State Administrative proceedings, Petitioner commenced the Federal action that is the

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[1]Section 230 of the Public Health Law contains the statutory framework for Physician Discipline in New York. It provides for a full range of penalties, up to and including license revocation.

subject of the instant request for a writ of certiorari. This action, as noted above, interposed a claim under 28 U.S.C. §1983, that the Respondent Bernard, acting under color of State law, improperly used his administrative powers for the purpose of injuring Petitioner's liberty and property interests. Following the filing and service of the Complaint herein, Bernard moved pursuant to FRCP 12(b)(6) to dismiss the Complaint for failure to state a claim upon which relief may be granted.

The Court below granted Bernard's motion and dismissed the Complaint. This dismissal occurred prior to the State Court final determination. Petitioner duly appealed to the Second Circuit Court of Appeals. While the appeal in the Second Circuit was under consideration, the Appellate Division of New York State Supreme Court affirmed the license revocation, and in doing so rejected the arguments Petitioner had raised in that case based upon Respondent's improper conduct, on the ground that in the absence of proof that such conduct tainted the entire administrative process, there was no basis to vacate the administrative discipline. Also while this case was sub judice in the Second Circuit, a request for leave to appeal the State Court license revocation was pending in the New York State Court of Appeals. That motion requesting leave to appeal was ultimately denied.[2] However, before that denial, the Second Circuit affirmed the District Court Decision, without prejudice in the event the license revocation was reversed.

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[2]The referenced New York State Appellate Division and Court of Appeals decisions are appended hereto starting on pages 25a and 23a, respectively.

A. The Parties

Dr. Moss is a physician with a national and international reputation as a surgeon, an innovator and an inventor who has been recognized by his profession for his many achievements. both clinical and as a leader in the field.[3]

The Complaint alleges that Respondent Dr. Bernard is a physician who had a well-recognized, long-standing animosity toward Dr. Moss and who carried a grudge and vendetta against Dr. Moss. Dr. Bernard's vindictiveness and bias made him ill-suited to evaluate Dr. Moss' work; yet that is precisely the role into which he interjected himself. Petitioner claims that he did so for the sole and malicious purpose of carrying out his vendetta against Dr. Moss.

The Complaint alleges that Dr. Bernard influenced the bringing of charges despite his awareness that the practices of Dr. Moss which were at issue had received exemplary clinical results and were editorially lauded as among the best achieved in the country and that other surgeons independently reported favorable results when duplicating Dr. Moss' techniques. The Complaint notes that an award winning video which was featured at the annual American College of Surgeons meeting, featured Dr. Moss and his innovative surgical techniques. A published commentary by Dr. Gordon Vineyard, a Harvard Surgery Professor, which accompanied the video stated:

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[3]See, e.g., Edward C. Salzstein, Leo C. Mercer, Jack B. Peacock, and Steve H. Dougherty: Twenty-four hour hospitalization after cholecystectomy. Surgery, Gynecology & Obstetrics 173:367-370, 1991.

> Dr. Moss' record is truly remarkable. He has now discharged 240 patients the day after surgery and the last 158 of these cases were consecutive. The results have been duplicated, at least partially, by others, and I have visited with Dr. Moss, watched his surgery and interviewed his patients before and after surgery. I was profoundly impressed.
>
> I believe we owe Dr. Moss a great debt. He has run the four minute mile. He has been an important innovator in advancing our ability to allow our patients to recover quickly and happily from major abdominal surgery. Since 1980, only one of Dr. Moss' 253 cholecystectomy patients has had a postoperative surgical infection. This rate (<0.4%) is a full order of magnitude lower than reported in the literature. (emphasis added).

Petitioner claims that there are two recognized procedures by which the competence of a highly specialized medical professional may be fairly judged. The first being that the clinical results (as a group) of the Petitioner could have been compared by Respondent to establish norms for "outcome criteria" (e.g., hospital length of stay, re-admission rate, complications, mortality, etc.).

However, petitioner claims that this approach to assessment was deliberately denied him. The biased interview such as that conducted by Respondent Bernard refused to allow consideration of all clinical information for patients other than those related to the specific individuals whose case was under review. Incredibly, one of these cases included the acute cholecystectomy patient whose postoperative infection was referred to above as evidence of Dr. Moss' **superlative** care. Alternatively, Dr. Moss' actions in each clinical situation could

have been reviewed to determine whether they fell outside of accepted standards.

It is obvious that a General Practitioner might correctly declare that it is improper for him to perform a delicate neurosurgical procedure. It would be unconscionable for him to state "I would not do that!" and censure a qualified Neurosurgeon, experienced and trained in this highly specialized discipline.

Similarly, by definition the usual practitioner would respond to questions regarding novel procedures with, "I would not do that!" Under that standard, any innovator could be punished and progress stifled.

Dr. Moss must be held accountable for his actions, but it was highly improper for his performance in individual cases not to be presented and reviewed by his **peers**, professionally recognized experts in the highly specialized fields of Surgical Critical Care and Surgical Innovation. Petitioner claimed that he was deprived of this opportunity by Dr. Bernard's bias.

It is alleged that Dr. Bernard knew that one of the patients relevant to the licensure review process was the one cholecystectomy patient referenced above that had a postoperative surgical infection.

The Complaint alleged that Dr. Norwald, Surgery Chairman at Northwestern University, also provided comment with respect to Dr. Moss, stating:

> Dr. Moss has confirmed that patients can be discharged within 24 hours of elective cholecystectomy without a high incidence of complications. (emphasis added). Especially noteworthy are the methods he used to reduce the pain and

suffering usually associated with a major operative procedure.

In addition, the October 1986 issue of the Journal of the American Medical Association was devoted to reviewing the year's major advances. Dr. Moss' surgical regimen was singled out in that publication by Dr. Arthur Baue, Chairman of the Yale University Surgery Department. It is believed that the Respondent was aware of these publications, and the 30-40 major medical center and community hospital teaching invitations Dr. Moss received annually.

There can be no reasonable dispute that Dr. Gerald Moss is nationally and internationally recognized and respected as a surgical innovator, challenging and discrediting established dogma.[4] For over 30 years, he has been reporting on his technique to immediately feed and sooner discharge surgical patients.[5] His patients' clinical outcomes were widely and regularly reported since 1963 in the surgical literature, and invited for presentation at professional meetings and at major medical centers.[6] These results have been

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[4]Moss G, Staunton C: Blood flow, needle size and hemolysis: Examining an old wives' tale. New England Journal of Medicine 282:967, 1970.

[5]Moss G: Nitrogen equilibrium in the early postoperative period. Surgical Forum 14:67-70, 1963.

[6]Moss G: Postoperative decompression and feeding. Surgery, Gynecology & Obstetrics 122:550-4, 1966. (Currently renamed Journal of the American College of Surgeons);

Moss G: Postoperative ileus is an avoidable complication. (editorial) Surgery, Gynecology & Obstetrics 148:81-82, 1979. (Currently renamed Journal of the American College of Surgeons);

Moss G, Nassif AC: Preserved postoperative GI function and full enteral

(Continued on next page.)

closely scrutinized and editorially lauded.[7]

Empire Blue Cross/Blue Shield of New York independently assessed Dr. Moss as having the best clinical results in its service area of New York State (which included Albany) using objective "outcome criteria" in 1983.[8] They sponsored a confirming prospective study of his clinical practice conducted by the Visiting Nurses Association of Albany. They presented and published their corroborating reports, which were instrumental in inducing other surgeons to emulate Dr. Moss in reducing patient postoperative incapacity, length of hospitalization, and complications.[9]

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[6](Continued from previous page.)
nutrition. Surgical Rounds 9:66-85, 1986;

Moss G: Gut function after severe trauma. In: Symposium on Management of Trauma, Columbia University, College of Physicians and Surgeons, Harlem Hospital Center, New York: 1987.

[7]Moss G: Discharge within 24 hours of elective cholecystectomy: The first 100 patients. Archives of Surgery 121:1159-61, 1986. (Editorial commentary by David L. Nahrwold, Professor & Chairman, Surgery Department Northwestern University).

[8]Regal ME, Lichtig LK: Immediate and sustained nutrition leads to safe early discharge after cholecystectomy (abstract). Journal of the American College of Nutrition 2:319, 1983. (Visiting Nurse Association of Albany and Empire BC/BS of NE NY);

Moss G, Regal ME, Lichtig L: Reducing postoperative pain, narcotics and length of hospitalization. Surgery 90:206-10, 1986.

[9]Fitzgerald TE, Page DW: Esophagogastric decompression and immediate enteral feeding following colon surgery (abstract). Journal of the American College of Nutrition 3:280, 1984 (Tufts University).

B. The Statutory Scheme

Professional discipline concerning physicians' licenses to practice medicine in the State of New York is carried out pursuant to New York Public Health Law ("PHL") §230.

Prior to the issuance of formal charges, the State Office of Professional Medical Conduct is required to provide an impartial interview to a physician suspected of professional misconduct. PHL §230(10)(a)(iii). In this case, the interview was conducted with Dr. Guest, the Executive Secretary of the Office of Professional Medical Conduct, and Respondent Dr. Bernard, who was present supposedly to provide surgical expertise to the Executive Secretary, who was not a surgeon.

Thereafter, an investigation committee of the Board of Professional Medical Conduct is convened, and the Office of Professional Medical Conduct, "after consultation with the Executive Secretary" and obtaining a concurrence of a majority of the Committee, can determine that a hearing is warranted. Counsel for the office is then directed to prepare formal written charges. PHL §230(10)(a)(iv).

Once charges are brought, the physician charged is entitled to a hearing before a hearing committee known as the Committee on Professional Conduct. PHL §230(10)(e). Either party, if dis-satisfied with the results, may seek review by the Administrative Review Board for Professional Medical Conduct. PHL §230(10)(i). The parties may seek review of the final administrative determination pursuant to Article 78 of the New York Civil Practice Law and Rules.

The Complaint alleges that prior to the issuance of formal charges, Dr. Bernard interjected himself as the supposedly impartial inter-

viewer with surgical expertise in Dr. Moss' cases in the proceeding against Dr. Moss.

The Complaint alleges that Dr. Bernard became involved despite the fact that (i) he and Dr. Moss had been colleagues and "competitors" as professors for over ten years in the Albany Medical College Department of Surgery; (ii) he previously had numerous negative dealings with Dr. Moss; (iii) he had a preconceived hostility with regard to Dr. Moss; and (iv) that he had actually treated one of Dr. Moss' patients after Dr. Moss, and then reviewed the care of that patient in the professional discipline interview conducted under PHL §230(10)(a)(iii).

Respondent's personal vendetta against Dr. Moss was evidenced by numerous instances occurring prior to the licensure proceeding, in which Dr. Bernard inappropriately wielded his power for the sole malicious purpose of intentionally injuring Dr. Moss. These instances are fully set forth in the Complaint dismissed by the District Court and include: Respondent blocking Dr. Moss' appointment as a Full Professor at Albany Medical Center; Respondent, acting as the supervisor of a residents' educational program, prohibiting Dr. Moss from having the assistance of and teaching Residents, despite Dr. Moss having privileges at the subject hospital and outstanding credentials as a surgical educator; Respondent, acting as Director of the Surgical House-Staff Education Program at Albany Medical Center, vetoing the Chief Resident's invitation for Dr. Moss to speak at a formal surgical residents' conference, an unprecedented restriction on the position and authority of the Chief Resident, who characterized it as the equivalent of "book burning".

The above examples cited in the Complaint are not exhaustive, but are merely representative of Dr. Bernard's animosity toward Dr. Moss which is alleged to be well known in the Albany medical community,

especially by Dr. Guest, the Executive Secretary of the Office of Professional Medical Conduct, who participated with Dr. Bernard in the licensure interview process, and who later acknowledged under oath, "I know that Dr. Moss and Dr. Bernard have crossed swords in the past."

The Complaint alleges that on or about March 23, 1989, Dr. Bernard conducted an interview with Dr. Moss, in Dr. Guest's presence, with regard to the medical cases dating from 1983 through early 1985. Sometime after that interview, Dr. Guest informed Dr. Moss that charges would not be brought because Dr. Bernard was unable to find another surgeon who, as an expert witness, would criticize Dr. Moss' patient care before the Hearing Committee of the State Board.

More than two and one-half years later, Dr. Bernard found a compliant physician. The chosen "expert" was a retired surgeon, neither a peer recognized specialist in Intensive Care, nor an academician familiar with recent innovative developments, who admittedly was ignorant and highly skeptical of developments in petitioner's early postoperative feeding and discharge regimen, all of which was the subject matter of the State's investigation.

Approximately one month later, on or about October 29, 1991, Dr. Moss was again called to an interview conducted by Dr. Bernard, in Dr. Guest's presence, for cursory discussion of the same cases. Formal medical disciplinary charges were thereafter brought against Dr. Moss. The reason for the second interview has not yet been made clear, but the fact that PHL §230(10(a)(iii) requires the investigation to be turned over to the investigation committee within 90 days of the interview lends credence to the conclusion that Dr. Bernard was unsuccessful in finding a compliant expert after the first interview; that he spent two and one-half years looking for one; and then, when

a compliant expert was retained, the second pro forma hearing was conducted.

Petitioner claims that Dr. Bernard was the one who made or heavily influenced the decision that formal medical misconduct charges be brought, acting not for reasons related to the patient care provided by Dr. Moss, but for malicious, intentional, wrongful and vindictive reasons actually based on the personal vendetta which he had developed against Dr. Moss. Dr. Bernard's history of animosity towards Dr. Moss and his persistent involvement in the initiation of discipline against him provide ample basis for the allegation of the impact of the vendetta on the initiation of the administrative process.

It can be inferred that jealousy also motivated Dr. Bernard. Dr. Bernard knew that the American College of Surgeons had gone beyond academic approval of Dr. Moss' innovations and their utilization by intensivists, and intended to encourage their implementation by practicing surgeons. He also knew that immediately preceding the State Hearing Committee proceedings in which Dr. Moss' practices were being reviewed, Dr. Moss presented, as an invited faculty at the American College of Surgeons Post Graduate Course (Spring 1992), a course on Enteral Feeding which provided the attendants Continuing Medical Education ("CME") credit and significant current information necessary for recertification.

Despite being educated with respect to the specialization of Dr. Moss' techniques, Petitioner claims that Dr. Bernard misled other State participants in the medical review process by categorizing the specific patient care at issue as routine surgery rather than procedures involving innovative techniques, the review of which required special knowledge, including, but not limited to, Critical Care. Dr. Bernard was fully cognizant of the difficulty Dr. Moss would face in defending those same techniques, in light of such mischaracterization, before a

committee not educated in currently accepted evolving state-of-the-art surgical practice, for the most part currently accepted and applied only by specialists in Critical Care.[10]

The charges against Dr. Moss were brought before the Hearing Committee which ordered that Dr. Moss' medical license be limited to consultation. Both Dr. Moss and the New York State Department of Health sought review by the Administrative Review Board for Professional Medical Conduct, which issued a determination and order, among other things, overruling the Hearing Committee's penalty limiting Dr. Moss' license to consultation and ruling that his license to practice medicine in the State of New York is revoked. Dr. Moss then timely commenced an Article 78 proceeding in State Supreme Court challenging the above determination and Orders on due process and other grounds. That proceeding resulted in license revocation. In commenting on Petitioner's argument in State Court that he was denied procedural due process due to the involvement of Respondent Bernard in the Disciplinary process, the Appellate Division found no basis to overturn the revocation on the ground that Petitioner could not establish that Respondent Bernard's bias infected the entire disciplinary process.

C. THE DISTRICT COURT DECISION

The Court below dismissed the Complaint based upon an extremely narrow reading of the Complaint. Judge McAvoy reviewed the Complaint in the context of a violation of procedural due process

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[10]Respondent Bernard further misled others involved in the process by, as previously stated, choosing a retired physician to act as an expert witness who was neither an intensivist (specialist in Intensive Care) nor an academician, and was admittedly ignorant of and highly skeptical of developments in early post-operative feeding and discharge.

only, when, in fact, the Complaint alleges facts constituting a violation of Dr. Moss' right to substantive due process as well.

The District Court relied on Blake v. Ambach, 691 F.Supp. 651, 655 (SDNY 1988) and Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 888 (2d Cir. 1987), for the proposition that the Court's function was limited only to determining "only whether the state has provided adequate avenues of redress to review and remedy arbitrary actions."[11] The Court then considered the fundamental question to be limited to a review of the due process compliance of §230 of the Public Health Law and concluded that the overall statutory scheme provides due process under the Constitution.

Finally, the Court dismissed plaintiff's claim alleging deprivation of equal protection by selective enforcement on the ground that the Complaint did not plead this claim with sufficient particularity.

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[11]The Second Circuit in Alfaro Motors, Inc. v. Ward, 814 F2d 833, relied on this Court's decision in Parratt v. Taylor for the above proposition. Parrat v. Taylor, 451 US 527, 543-44, 101 S.Ct. 1908, 1916-1917 (1981), overruled on other grounds; Daniels v. Williams, 474 US 327, 106 S.Ct. 662 (1986), cited in Alfaro at 814 F2d 888. However, Parratt involved the distinction between a state negligence claim arising out of a prison official's loss of hobby materials belonging to an inmate, and a federal civil rights action claiming such loss deprived the claimant of property without due process. This Court merely held that the availability of state procedures to redress the wrong prevented all such negligence claims being converted into actionable due process deprivations. This case, by way of contrast, involves substantive due process rights against wrongful intentional conduct. See, Daniels v. Williams, 474 US 332, 330, 106 S.Ct. 662, 664 (1986).

On appeal to the Second Circuit, Respondent argued that the upholding of license revocation together with the rejection of Petitioner's procedural Due Process Argument in State Court created a preclusive effect that prevented any due process claim from succeeding as a basis for a 28 U.S.C. §1983 claim, no matter how egregious the underlying conduct. The Second Circuit's agreement with the preclusive analysis of the Respondent could have far reaching implications in civil rights cases involving deprivations of substantive due process. It is submitted that the preclusive use of the State Court proceedings goes far beyond the preclusion authorized in Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892 (1984). It is for this reason that the writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

POINT I

The court below improperly applied preclusion to prevent the interposition of civil rights claims.

The risk inherent in the overbroad preclusive use of State due process-like determinations in Federal Court is particularly evident here, because Petitioner alleges a due process claim against Respondent that is fundamentally different from any due process consideration that was reviewable in State Court. Thus, aside from the risk of restricting Federal Civil Rights actions based on overly aggressive preclusion derived from State proceedings, this case also presents issues concerning preclusion as to matters which were not and could not have been considered in State Court. Compare, McDonald v. City of West Branch, 466 U.S. 284 (1984).

The due process clause encompasses three types of claims. First, the clause incorporates many specific provisions of the Bill of Rights; second, it has a substantive component that prohibits certain arbitrary wrongful government actions "regardless of the fairness of the procedures used to implement them"; and third, it has a procedural component which is a guarantee of fair procedure. See, Daniels v. Williams, 474 U.S. 327, 331-332, 106 S.Ct. 662, 664-665, *supra* (1986). The violation of the substantive component is complete when the action is taken and is not dependent upon a review of the procedures to review the violation. Id.

The District Court Decision was grounded on the availability of procedures to redress the wrongful acts of Respondent, and did not address the fundamental claims of the Complaint because the action of Dr. Bernard is wrongful "regardless of the fairness of the procedures used to implement [it]". Id. at 331. Accordingly, the question to be addressed below in the Federal context was whether Dr. Bernard's abuse of the governmental power entrusted to him constitutes a violation of Dr. Moss' right to substantive due process, and whether consideration of this claim is properly foreclosed from consideration by Federal Courts on the ground that the State Court found no due process ground sufficient to overturn the medical discipline.

The substantive component of the due process clause was intended to "prevent governmental power from being 'used for purposes of oppression'". Daniels, supra, 474 U.S. at 331, 106 S.Ct. at 665 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277, 15 L.Ed. 272 (1856)) and "to prevent government 'from abusing its power'". Collins v. City of Harker Heights, ___ US ___, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992) quoting DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 at 196, 109 S.Ct. 998 at 1003 (1989). Here,

the Complaint clearly alleges a gross abuse of governmental power for the purpose of depriving Dr. Moss of both liberty and property interests.

While freedom from bodily restraint is the quintessence of the liberty protected by the due process clause, that clause, "[w]ithout doubt,...denotes not merely freedom from bodily restraint but also the right of the individual to...engage in any of the common occupations of life." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed.2d 1042 (1923). In addition to his liberty interest, Dr. Moss had a property right to his license to practice medicine in New York State. Damino v. O'Neill, 702 F.Supp. 949 (EDNY 1987).

Having identified these two rights, it is important to consider whether the State Action--malicious institution of nearly 10-year-old stale charges of professional misconduct for the purpose of carrying out a vendetta--could be considered arbitrary in the constitutional sense and thus, violative of substantive due process. Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994).

On the motion to dismiss in District Court, the allegations of the Complaint must be taken as true, and the Complaint should have been sustained unless it appears beyond doubt that Appellant can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Dahlberg v. Becker, 748 F.2d 85, 88 (2d Cir. 1984) cert. denied 470 U.S. 1084, 105 S.Ct. 1845 (1985).

The facts alleged in the Complaint clearly show oppressive and abusive governmental conduct. As distinguished from Rosa R. v. Connelly, 889 F.2d 435 (2d Cir. 1989) cert. denied 496 U.S. 941, 110 S.Ct. 3225, __ L.Ed.2d ___ (1990) where this Court, ruling on an appeal from a grant of summary judgment, considered defendant's

affidavits offering legitimate reasons for defendant's conduct and thus found that plaintiffs had "failed to establish that the decision was arbitrary or irrational or motivated by bad faith" (Id. at 439), this case is in the procedural posture where plaintiff's factual allegations must be taken as true; taken as true, the petitioner here establishes "that the decision was arbitrary...irrational [and] motivated by bad faith." Id. See also, Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133 (2d Cir. 1994) (Directed verdict to defendants on substantive due process claim on the ground that defendant's evidence supported defensible safety and environmental concerns for the governmental action).

Under §230(10)(a)(iii) of the Public Health Law, Respondent was to serve as the statutory gatekeeper for the professional discipline process, as the person to whom the accused would "...provide an explanation of the issues under investigation." When the recipient of the explanation found it unavailing, which Petitioner alleges occurred due to Respondent's prejudice, the case was formally presented for the preparation of charges.

Respondent argued in the Court below that the review of these charges by a subsequent independent body (the Committee on Professional Conduct, see Public Health Law §230[10][e]), essentially mooted all improper conduct, and that the confirmance of revocation effectively precluded any federal 1983 claim.

This argument is fundamentally flawed because it would result in the wrongful conduct becoming insulated from review in any forum, and most importantly in a Federal Civil Rights case. The professional discipline process under §230 (and the subsequent Article 78 proceeding) is a review of the propriety of license revocation (PHL §230[10][g]) under State law, not a review of the fundamental unfairness of the initial interview procedure. In fact, PHL §230(10)(g) specifically limits the authority of the Committee to

"make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, (3) and a determination regarding charges sustained or dismissed, and in the event of any charges having been sustained [,the penalty]." Thus, the claimed overall compliance of §230 of the Public Health Law with procedural due process, even if that could have been preclusively established, does not address plaintiff's unfair treatment at the hands of Dr. Bernard and his being coerced into a supposedly protective interview, supposedly designed to protect his vital interest in not being charged with professional misconduct, only to find that interview being conducted by a biased enemy.

Under such circumstances, the process of review of the underlying charges fails to provide a meaningful review of the Respondent's actions.[12] See, Lowrance v. Achtyl, 20 F.3d 529, 536 ("allowing the confined inmate to be heard on his administrative confinement only at the disciplinary hearing on the underlying charges of misbehavior effectively precludes a challenge to the confinement itself").

In Mischler v. Nevada State Board of Medical Examiners, 896 F.2d 408 (9th Cir. 1990) cert. denied 494 U.S. 1038, 110 S.Ct. 1498, the Court found that a cause of action was stated under §1983 where the plaintiff, a doctor, was not given a response for 17 months from the Medical Board to a request for a confirmation of good standing.

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[12] It is not clear at all under New York Law whether New York Courts will, in an Article 78 proceeding, even reverse adverse licensure action based on fundamental unfairness in the interview process. (See, Moss v. Chassin, Appellate Division Decision, at Ap. p. ___). Section 230 does not speak to the consequences of such unfairness. However, it is a fundamentally different question whether the failure to find a procedural due process deprivation precludes a substantive due process claim in Federal Court, as found by the Court below.

Plaintiff claimed a loss of property right in his license because the refusal to issue the certification cost him a job in Ohio. Although the State of Nevada filed professional discipline charges 17 months after the initial request to confirm good standing, the Ninth Circuit nonetheless held that a §1983 claim was stated because the plaintiff "...alleged malicious or reckless taking...under color of official right." Mischler, supra 896 F.2d at 411.

Section 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws and to provide a remedy for violation of civil rights "where state law was inadequate" but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, 365 U.S. 167 at 173-74, 81 S.Ct. 473 at 476-77, 5 L.Ed.2d 492 (1961) (overruled in part not relevant here, by Monell v. New York City Dept. of Social Services, 436 U.S. 658, 664-689, 98 S.Ct. 2018, 56 L.Ed.2d 611 [1978]). The Supreme Court stated:

> It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Monroe v. Pape, supra, 365 U.S. at 183.

Here, the State Law, Public Health Law §230(10)(a)(iii), was designed to provide a neutral medical expert to evaluate potential charges of professional misconduct before they are brought. This legislative design is subject to abuse when, as here, the supposedly neutral medical expert is not dispassionate, but rather acts to carry out a vendetta and undermine the prophylactic purpose of his position.

The District Court found that the Complaint alleged at most a mere violation of State Law and that the plaintiff had all the process which he was due when he pursued his administrative remedies pursuant to §230 of the Public Health Law. Importantly, however, in discussing the process to which plaintiff was due, Judge McAvoy also emphasized the availability of the Article 78 proceeding and the fact that the plaintiff had commenced an Article 78 proceeding.

It is clear from the District Court Decision and other decisions of the Second Circuit, Campo v. New York City Employees' Retirement System, 843 F.2d 96, 101-03 (2d Cir. 1984) cert. denied 488 US 899, 109 S.Ct. 220, 102 L.Ed.2d 211 (1988); Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir.) cert. denied 469 US 932, 105 S.Ct. 328, 83 L.Ed.2d 265 (1984), that an Article 78 proceeding is an integral part of the due process machinery available to a physician who is deprived of a license to practice medicine. See also, Blake v. Ambach, 691 F.Supp. 651 (SDNY 1988).

The availability of an Article 78 proceeding, however, cannot not cure or remedy all of the deprivations caused by the violation of state law. Indeed, the scope of Article 78 review is limited, and the remedy is limited to a reversal of the administrative proceedings and a restoration of his license. See, Campo v. New York City Employees' Retirement System, 843 F.2d 96, 101 [2d Cir. 1988]). Moreover, in an Article 78 proceeding, one must sue the State officials in their official capacity, and only incidental damages are available. See, Garguil v. Tompkins, 790 F.2d 265 (2d Cir. 1986). N.Y. CPLR §7806.

The Respondent argued, and the Second Circuit accepted that the State Court decision which confirmed the administrative revocation of the plaintiff's medical license, although confined in scope and subject to standards of limited review, created a preclusive effect

requiring dismissal of this action. However, the State Court determination did not even mention, let alone rule on, the malicious acts Respondent Bernard committed under color of State law at issue here. However, because the State Court denied relief with regard to the alleged unfairness of the administrative proceedings, expressing a "due process" analysis, the Second Circuit has accepted that such due process analysis must be inclusive of any claim that could be presented here, including those involving substantive due process.

In substance and effect, the Second Circuit holding means that all civil rights violations committed by participants in an administrative proceeding are cured upon the confirmation of an administrative determination, regardless of whether those due process issues were or could have been raised in State Court.

Such a holding at the very least creates an entirely new and substantially more extensive application of unqualified immunity then now exists under current law, legally shielding state actors from suits seeking relief from purposeful, malicious abuses of official powers. The mere interposition of an apparently neutral State Court Administrative reviewer over any manner of nefarious State actors will effectively immunize such actors from Civil Rights claims no matter how outrageously wrong is their conduct. This preclusive use of State Court proceedings goes far beyond Migra v. Warren City School District Board of Education (supra), 465 U.S. 75 (1984).

Therefore, this case is particularly dangerous as precedent in view of the limited scope of the State Court determination upon which Respondent relies for preclusive effect:

> "[This proceeding was brought on] pursuant to CPLR Article 78 (initiated in this Court pursuant to Public Health Law §230-c[5]) to review a determination of the Administrative

> Review Board for Professional Medical Conduct which revoked petitioner's license to practice medicine in New York."

(Memorandum and Judgment, dated November 23, 1994).

The Appellate Division noted that the bias of Respondent raised no basis for administrative reversal because there was:

> "... no proof that the doctor's alleged bias infected the hearing committee or the review board, disabling those bodies from hearing and deciding the matter on the basis of the evidence presented at the hearing."

(Slip Op. at p.3).

Even applying New York's rules of preclusion, the result obtained below does not follow because Respondent Bernard was not a party to the Article 78 review and the instant civil rights claims were not addressed in that process, nor did Respondent Bernard ever claim that such commingling of actions should or even could have occurred.[13] The Article 78 proceeding could not and did not settle the issue of whether there was wrongful conduct on the part of Dr. Bernard, much less whether there is a civil right claim on which he may be liable. In fact, in the absence of proof of bias infecting all subsequent arbiters, the State Court considered such conduct as irrelevant to the viability of the administrative determination. Yet, the extremely dangerous precedent now set is that this limited State Court Review gives a wrongdoer the basis to evade judicial review of his malicious conduct

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[13]Damages for civil rights violations may not be recovered in an Article 78 proceeding. Davidson v. Capuano, 792 F2d 275, 278-79 (2d Cir. 1986); Gutierrez v. Coughlin, 841 F2d 484, 486 (2d Cir. 1988).

under the guise that this entire cause of action had been previously litigated in the State Article 78 proceeding, purportedly creating an estoppel effect.[14]

It had previously been well settled that a New York plaintiff is not barred from seeking damages on a civil rights claim in federal court even by reason of a prior judgment on the same underlying facts in an Article 78 proceeding. Davis v. Halpern, 813 F2d 37, 39 (2d Cir. 1987); Davidson v. Capuano, 792 F2d 275 (2d Cir. 1986); Giano v. Flood, 803 F2d 769 (2d Cir. 1986). The effect of the decision below is to require individuals to choose between: (1) exercising their statutory right to limited judicial review of an administrative determination (which in this case involves risk of medical license revocation); or (2) invoking now existent rights under 42 U.S.C. §1983 seeking redress against participants in an administrative process for malicious and purposeful violation of constitutional rights. Certainly this limitation is not contemplated by any statute or legal authority, as it conflicts with basic justice and rudimentary concepts of federal jurisdiction.

Paradoxically, the preclusion doctrine adopted below does not even find accord under New York law. "New York Courts treat collateral estoppel, or issue preclusion, as 'a component of the broader doctrine or *res judicata*' which permits 'the determination of an issue of fact or

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[14]As later addressed herein, most likely recognizing the inapplicability of res judicata, Respondent Bernard argued collateral estoppel. However, Respondent's factual analysis is undoubtedly one for claim preclusion ("... plaintiff had a full and fair opportunity to litigate this claim in state court.") As the Appellate Division requirement of total infection of the administrative process demonstrates, litigation of petitioner's claim in an Article 78 proceeding was impossible, yet that Court's determination creates the bar in Federal Court.

law raised in a subsequent action by reference to a previous judgment in a different cause of action in which the same issue was *necessarily raised and decided*.'" Fay v. South Colonie Cent. School Dist., 802 F2d 21 (2d Cir. 1986) (citing Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481). It is well settled that the law of issue preclusion can only be applied if all of the following circumstances are met:

> (1) there has been a final determination on the merits of the issue sought to be precluded; (2) the party against whom preclusion is sought had a full and fair opportunity to contest the decision invoked as dispositive in the later controversy; and (3) the issue sought to be precluded by the earlier suit is the same issue involved in the later action.

Davis, 813 F2d at 39 (citing Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481).

The above-referenced criteria are not met here. There has not been a final determination on the issue of whether Respondent Bernard violated Dr. Moss' civil rights.

The Appellate Division addressed whether plaintiff should have the results of an administrative hearing annulled due to Dr. Bernard's bias; an issue which neither encompasses nor rises to the level of the constitutional issues herein.[15] The Appellate Division recognized the limited scope of its review and did not address whether the malicious acts of Respondent Bernard himself actually violated plaintiff's

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[15]Bias in and of itself carries no requirement of mal-intent necessary for a civil rights claim. Plaintiff initiated the instant action against defendant Bernard based on the defendant's malicious acts, not simply on the basis of his bias.

constitutional rights, from a substantive due process respect or otherwise. The Article 78 proceeding did not result in a holding that there was no misconduct by Dr. Bernard under color of state law; instead, it was the finding of the Court that there was a sufficient basis for revocation.[16]

The basis for a determination of issue preclusion simply cannot be found in this case. The non-existence of a prior adjudication of Respondent Bernard's unconstitutional acts precludes a showing that there was a full opportunity to litigate identical issues. Burgos v. Hopkins, 14 F3d 787, 792 (2d Cir. 1994). The Article 78 proceeding was explicitly limited to whether the administrative determination revoking plaintiff's medical license was "arbitrary and capricious, affected by an error of law or an abuse of discretion" Moss v. Chassin, Appellate Division Decision, at Ap. p 25a.

The Respondent also argued that there is no constitutionally protectable interest if plaintiff's constitutional deprivation was complete upon Dr. Bernard's wrongful actions (See, Appellee's Supplemental Brief in the Court below, p.9). In effect, the Respondent contends that all substantive due process violations are destroyed by any semblance of procedural due process, a proposition

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[16]The State Court determination recognized that credibility issues were outside its province and held that based on that legal principle, among others, in its opinion ample evidence existed supporting the administrative findings regarding the medical care at issue. Moreover, it should also be noted that since no authority exists which allowed comprehensive discovery in the administrative process or judicial review of the determination resulting from the same (Sinha v. Ambach, 91 AD2d 703), an opportunity to litigate the issues presented in this case was not only absent in State Court, but additional insight into the malicious acts of defendant Bernard was in no way allowed.

for which no authority is cited. The due process clause of the United State's Constitution clearly encompasses a substantive component that prohibits certain arbitrary wrongful government actions regardless of the fairness of the procedures used to implement them. Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662. A violation of the substantive component is complete when the action is taken and is not dependent upon a review of the procedures to review the violation. Id.

To find issue preclusion in this circumstance would require a determination that all of the issues in the instant suit were brought in the Article 78 proceeding, including those involving substantive due process, and that the differences in the nature of the Article 78 proceeding and this action provides no basis to allow petitioner herein a chance to prove his claims. Burgos v. Hopkins, 14 F3d 787, 793 (2d Cir. 1994). Besides that the main issue -- whether the malicious conduct of Respondent Bernard violated plaintiff's constitutional rights -- has never been litigated; the irrefutable difference between the scope of relief available with regard to State Article 78 proceedings and Federal 42 U.S.C. §1983 claims simply prevents any preclusive effect whatsoever, let alone one so serious as to justify dismissal of this action. See, Gutierrez v. Coughlin, 841 F2d 484.

CONCLUSION

The writ requested in the instant petition should be issued.

Dated: May 23, 1995

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit dated February 24, 1995.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of February, one thousand nine hundred and ninety-five.

Present:

Honorable Ellsworth A. Van Graafeiland,
Honorable Ralph K. Winter,
Honorable Pierre N. Leval,
Circuit Judges.

GERALD MOSS, Ph.D., M.D.,

Plaintiff-Appellant,

against

HARVEY BERNARD, M.D., Individually, and in his Official Capacity as a State Participant pursuant to Public Health Law Section 230,

Defendant-Appellee.

ORDER #94-7597

Opinion of the United States Court of Appeals for the Second Circuit dated February 24, 1995

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Gerald Moss appeals Judge McAvoy's dismissal of his complaint pursuant to Fed. R. Civ. P. 12 (b) (6). Moss argues that the complaint stated a claim for violation of his substantive due process rights during a state proceeding that resulted in the revocation of his medical license. Moss is collaterally estopped from bringing his federal suit because the issues raised in the complaint have been resolved in a parallel state court decision rendered since the complaint was dismissed.

Moss alleges that the defendant-appellee, Harvey Bernard, who was a witness in proceedings to review Moss's professional conduct, acted maliciously to deprive Moss of his medical license. Moss claims that, due to Bernard's conduct, the decision to revoke Moss's license was "arbitrary . . . irrational [and] motivated by bad faith."

On November 23, 1994, New York's Appellate Division, Third Department issued an opinion that disposes of Moss's procedural and substantive due process claims. The decision rejected Moss's claim that Bernard's "alleged bias infected the Hearing Committee or the Review Board, thereby disabling those bodies from hearing and deciding this matter on the basis of the evidence presented at the hearing." Thus, the state court found that Moss lost his license on the untainted merits and that

Opinion of the United States Court of Appeals for the Second Circuit dated February 24, 1995

Moss "was not denied due process." Because the state court's decision determines that the decision to revoke Moss's license was not "arbitrary or irrational or motivated by bad faith," *Rosa R. v. Connelly,* 889 F.2d 435, 439 (2d Cir. 1989), *cert. denied*, 496 U.S. 941 (1990), it collaterally estops Moss from bringing a procedural or substantive due process claim in federal court.

We therefore affirm without prejudice to Moss's moving to reopen should the New York Court of Appeals overturn the Appellate Division's decision.

s/Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

s/Ralph K. Winter
Ralph K. Winter, U.S.C.J.

s/Pierre N. Leval
Pierre N. Leval, U.S.C.J.

N.B. This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in the unrelated cases before this or any other court.

United States Court of Appeals
Second Circuit
Filed
Feb 24 1995
George Lange III, Clerk

**Docket Entries of U.S. District Court,
Northern District of New York.**

MAG APPEAL
CLOSED

U.S. District Court
Northern District of New York (Albany)

CIVIL DOCKET FOR CASE #:93-CV-1605

Moss v. Bernard
Filed: 12/27/93
Assigned to: Chief Judge Thomas J. McAvoy
Jury demand: Plaintiff
Referred to: Magistrate Judge Ralph W. Smith
Demand: $0,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

Docket Entries of U.S. District Court,
Northern District of New York

GERALD MOSS, Ph.D., M.D. plaintiff	James E. Dering [COR LD NTC] Gleason, Dunn Law Firm 11 North Pearl Street 15th Floor Albany, NY 12207 518-432-7511
v.	
HARVEY BERNARD, M.D. Individually and in his Official Capacity as a State Participant Pursuant to Public Health Law, Section 230 defendant	Judith I. Ratner, AAG 518-473-3685 [COR LD NTC] Office of Attorney General State of New York Department of Law The Capitol Albany, NY 12224

Docket as of July 21, 1994 11:27 am

Docket Entries

Proceedings include all events. 1:93cv1605 Moss v. Bernard	MAG APPEAL CLOSED

12/27/93 1 COMPLAINT filed; FILING FEE $120.00 RECEIPT # 17026; Service deadline 2/25/94 for Harvey Bernard (wbl)

Docket Entries of U.S. District Court, Northern District of New York

12/27/93	--	SUMMONS (ES) issued for Harvey Bernard (wbl)
12/27/93	--	CASE REFERRED to Magistrate Judge Ralph W. Smith (wbl)
12/27/93	--	Filing Order Issued; Conference set before Magistrate Judge Ralph W. Smith in Albany, Status Conference at 11:30 4/6/94, Deadline for filing Case Management Plan, 3/23/94 (wbl)
1/5/94	2	ACKNOWLEDGEMENT OF SERVICE as to Harvey Bernard on 12/28/93: Answer due on 1/17/94 for Harvey Bernard (ssh)
1/20/94	5	ORDER, Reset Answer deadline to 2/17/94 for Harvey Bernard (signed by Magistrate Judge Ralph W. Smith) (cjb) [Entry date 03/21/94] [Edit date 03/21/94]
2/18/94	3	Defts MOTION for Dismissal, Hearing set for 4/11/94, 10:00 a.m. in Albany before Judge McAvoy, Response 3/28/94, Reply 4/4/94; AFFIRMATION of Judith I. Ratner, AAG (plp)
2/18/94	4	Defts MEMORANDUM in support of their [3-1] motion for Dismissal (plp)
3/25/94	--	File transferred from Albany to Binghamton—Attn: Penny. (wjg)

Docket Entries of U.S. District Court,
Northern District of New York

3/28/94	6	AFFIDAVIT by James E. Dering for Gerald Moss Re: [3-1] motion for Dismissal (tmw) [Entry date 03/29/94]
3/28/94	7	MEMORANDUM and Proposed Order by Gerald Moss in opposition to [3-1] motion for Dismissal (tmw) [Entry date 03/29/94]
3/30/94	8	Scheduling Notice: Defts [3-1] motion for Dismissal is ADJOURNED from 4/11/94 to 5/9/94, 10:00 a.m. in Albany before Judge McAvoy due to no receipt of opposition papers, Response 4/25/94, Reply 5/2/94 [served 3/30/94] (plp)
3/30/94	9	Pltf Atty Dering ltr to court dd 3/29/94 requesting court substitute page 14 of opposition memoranda due to word discrepancy (plp) [Entry date 04\05\94]
4/12/94	10	Minute entry: MOTION CALENDAR HELD 4-11-94 ALBANY NY Appearances: Court Reporter/ECRO: V. Theleman; No Counsel. Deft Motion for Dismissal [3-1]—ADJOURNED TO 5-09-94 IN ALBANY (pta) [Entry date 04/13/94]

Docket Entries of U.S. District Court, Northern District of New York

5/16/94	11	ORDER; granting [3-1] Defts motion to Dismiss the Complaint; Clerk shall enter Judgment dismissing Complaint and this action against the Deft (dd 5-14-94 signed by Chief Judge Thomas J. McAvoy) (pta) [Entry date 05/17/94]
5/16/94	13	MINUTES OF 5/9/94 MOTION HEARING: Deft [3-1] motion for Dismissal is GRANTED; App: James E. Dering, Esq., for Pltf; Judith A. Ratner, Esq., for Deft; CR: M. L. Stasolla; LC: M. Lee (plp) [Entry date 05/18/94]
5/17/94	12	JUDGMENT dismissing Pltf Complaint in favor of Harvey Bernard against Gerald Moss (pta)
5/17/94	--	Case closed (Office 1), file being maintained by Binghamton NY Clerk's Office (pta)
6/3/94	14	TRANSCRIPT filed for dates of 5/9/94 (tmw)
6/7/94	15	NOTICE OF APPEAL by Gerald Moss of 5/16/94 Order and 5/17/94 Judgment. FILING FEE $105 RECEIPT # 17463 Appeal record due on 7/7/94 (tmw) [Entry date 06/09/94]
6/9/94	--	Notice of appeal and certified copy of docket to USCA re: [15-1] appeal by Gerald Moss (parties noticed). (tmw)

Docket Entries of U.S. District Court, Northern District of New York

7/11/94	16	Court of Appeals Scheduling Order, re: [15-1] appeal by Gerald Moss; Appeal record due on 7/25/94 (plp)
7/11/94	--	USCA Case Number Re: [15-1] appeal by Gerald Moss USCA NUMBER: 94-7597 (plp)
7/11/94	--	Document #16 (2CCA Scheduling Order) transferred from Bing to Albany (Tara). (plp)

Docket as of July 21, 1994 11:27 am

Transcript Decision of U.S. District Court, Northern District of New York dated May 9, 1994.

(20) The Court: Okay. Now, as I just stated a few moments ago—and I'm sure that both of you are well aware that I have to create a record for the Circuit—on a motion to dismiss, the facts alleged by the plaintiff are assumed to be true and must be liberally construed in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1943 (1992). While the court need not accept mere conclusions of law, the court should accept the pleader's description of what happened along with any conclusions that can reasonably be drawn therefrom. *Murray v. City of Milford*, 380 F.2d 468 (2d Cir. 1967). Thus, the court's inquiry on this Rule 12(b)(6) motion is merely directed to whether plaintiff's allegations constitute a statement of claim under Rule 8(a), which calls for "a short and plain statement of the claim (21) showing that the pleader is entitled to relief." Federal Rules of Civil Procedure 8(a).

In sum, a complaint should not be dismissed for failure to state a claim unless it appears, beyond doubt, that the plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957); *Dahlbert v. Becker*, 748 F.2d 85, 88 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1845, 470 U.S. 1084 (1985); *Wanameker v. Columbian Rope Co.*, 740 F. Supp. 127 (N.D.N.Y. 1990). It is in light of these considerations that the plaintiff's complaint will be examined.

A valid claim under 42 U.S. Code Section 1983 requires a plaintiff to make two allegations: One, that some person has violated the plaintiff's protective rights under the U.S. Constitution or federal law; and, two, that the person who allegedly violated such rights acted under color of state law. *Gomez v.*

Toledo, 446 U.S. 635, 640 (22) (1980). It's clearly undisputed that the defendant in this action is a state actor, and thus, the only issue which remains is whether plaintiff's constitutional rights were violated by the defendant. Plaintiff has alleged violations of his rights to due process and equal protection under the Fourteenth Amendment of the U.S. Constitution. The court will address these two arguments seriatim.

It's now well settled that the "fundamental requirement of due process is the opportunity to be heard 'in a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)). More specifically, "the role of a federal court, under Section 1983, in reviewing the state's revocation of a medical license is a limited one: 'to determine only whether the state has provided adequate avenues of redress to review and (23) remedy arbitrary action.'" *Blake v. Ambach*, 691 F. Supp 651, 655 (S.D.N.Y. 1988) (quoting *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 888, (2d Cor. 1987)). Simply stated, Section 1983 is not a means for litigating in a federal court the issue of whether a state or local administrative decision was wrong or made in bad faith or even it was arbitrary and capricious. *See Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n. 9 (1st Cir. 1982); *Blake*, 691 F. Supp at 655. Moreover, it's clear that an Article 78 proceeding is an adequate state procedure for protecting the property interest of a professional license in order to satisfy the requirements of procedural due process under the Constitution. *Blake*, 691 F. Supp at 655.

So the basic fundamental question to be asked here is did the state procedures under Public Health Law Section 230 provide

plaintiff with adequate avenues of redress to review and (24) remedy defendant's alleged wrongful actions.

Section 230 of the Public Health Law sets forth, among other things, the procedures under which the plaintiff is given an opportunity to present his own defense: One, within 90 days of the initial interview, an investigation committee and professional conduct of the Board for Professional Medical Conduct is convened. This committee consists of two physicians and a lay person. That's the Public Health Law Section 230(6); two, if the Director of the Office of Professional Medical Conduct determines that a hearing is warranted, the Director directs counsel to prepare charges against the physician, Public Health Law Section 230(10)(a)(iv). The hearing committee then conducts a hearing on the charges brought against the individual. This committee consists of two doctors and a lay person. Also present at the hearing is the administrative law judge to rule on legal (25) issues. During this hearing, the charged person is accorded all due process rights under the constitution, such as the right to appear personally and to be represented by counsel, to produce witnesses and evidence, to cross-examine witnesses, etcetera. Public Health Law Section 230(10)(c)(f). After the hearing committee makes its finding of fact and conclusions of law concerning the charges, the determination may be reviewed by the Administrative Review Board upon the request of a party. This Board consists of three doctors and two lay persons. Public Health Law Section 230(10)(i). Finally, any order of the Administrative Review Board is subject to judicial review in a state court proceeding under New York Civil Practice Law and Rules Article 78.

Transcript Decision of U.S. District Court, Northern District of New York dated May 9, 1994

The disciplinary process just outlined does indeed provide plaintiff with all the process that's due under the United States Constitution. It gives plaintiff notice of the charges (26) brought against him and the reason for the charges. Furthermore, it provides plaintiff with the opportunity to be heard at all stages of the proceedings and effectively present his defense by producing and cross-examining witnesses and evidence presented. *See* Public Health Law Section 230(10)(c)(f); *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1021 (1970); the *Blake* case I've already cited at page 655. It must be noted plaintiff does not allege that he was deprived of opportunities to be heard at any stage of the proceedings, *see Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965), nor does he allege that he was deprived of an opportunity to defend himself by confronting any adverse witnesses or evidence presented. That's the *Goldberg* case that I already stated.

Confining our facts to those pleaded in plaintiff's complaint, and assuming for the sake of this motion that defendant did indeed interview (27) plaintiff with malicious intent, it is clear that plaintiff had numerous opportunities at various stages of the administrative proceedings to bring to light all the plaintiff's concerns about the improprieties of the initial interview with the defendant. Plaintiff has availed himself to all the above-mentioned hearings and reviews, and furthermore, plaintiff has brought an Article 78 proceeding in state court which is now pending.

From the facts alleged, it is plain that the state has satisfied the minimum fundamental requirement of due process by providing plaintiff with an opportunity to be heard "at a

meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at page 333, 96 S.Ct. at 902. This conclusion is further supported by the fact that plaintiff is now seeking an Article 78 proceeding in state court. As stated earlier, such a state proceeding is considered to be an adequate procedure to protect the (28) property interest in a professional license to satisfy the requirement of procedural due process under the Fourteenth Amendment of the United States Constitution. It's *Blake* again and *Moore v. Ross* at 687 F.2d 604 (2d Cir. 1982).

Now, plaintiff has attempted to demonstrate that the defendant not only tainted the initial interview, but also tainted all of the subsequent hearings by misleading and mischaracterizing the evidence presented during the initial interview which inevitably denied his right to due process. This argument is groundless because even assuming, arguendo, that the defendant did, in fact, act improperly during the initial interview, plaintiff had an ample opportunity to address these concerns to the committees in subsequent hearings and reviews. As previously stated, plaintiff does not allege that the committee in any way denied him such an opportunity. Therefore, it's the court's determination that plaintiff has (29) been accorded his due process rights under the Constitution and the facts presented.

Plaintiff further alleges that even if he had been accorded due process throughout the subsequent hearings, the fact that the defendant acted with malicious intent during the initial interview entitles him to nominal damages. He cites, as he did here in oral argument today, that *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978), and also stated in his brief other cases for such proposition. This argument is without merit because the

court's determination that plaintiff failed to assert a valid due process claim stands firm even if we were to assume that defendant acted improperly during the initial interview process with plaintiff. This is because plaintiff was accorded with at least the minimum due process required under the Constitution. The cases cited by plaintiff are irrelevant to plaintiff's argument (30) because they only address the issue of whether one needs to demonstrate actual damages in order to state a viable cause of action for a due process claim. That's *Carey* at pages 1053 and 54. Although such an issue may be an interesting one, it has no application to the case at bar.

In sum, looking at the facts alleged in the complaint in light most favorable to the plaintiff, plaintiff has failed to allege that his due process rights were violated. At most, all plaintiff has alleged in his complaint is a procedural violation of a state statute which standing alone is not redressable under Section 1983. *See McDarby v. Dinkins*, 907 F.2d, 1334, 1338 (2d Cir. 1990). So the defendant's motion to dismiss the plaintiff's due process claim is granted.

Now, as to the second claim, plaintiff has alleged the defendant engaged in selective prosecution which violated his equal (31) protection rights under the Fourteenth Amendment of the U.S. Constitution.

Courts have stated that the "conscious exercise of some selectivity in enforcement does not, by itself, deny "equal protection." *University Club v. City of New York*, 655 F. Supp 1323, 1328 (S.D.N.Y. 1987), *affirmed*, 842 F.2d 37 (2d Cir. 1988) (citing *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505-06 (1962)). However, equal protection is denied when impermissible consideration such as race or religion or a desire

to prevent the exercise of a constitutionally protected right is taken into account. *See Oyler*, at page 456; *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

A party alleging selective prosecution must first establish a prima facie case: "One, that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis for the charge against him, he has been singled (32) out for prosecution; two, that government's prosecution has been invidious or in bad faith, i.e. based upon impermissible considerations." *Berrios*, at page 1211. Unless both prongs are sufficiently alleged in the complaint, plaintiff's claim for selective prosecution will not survive the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The complaint herein has failed to allege the first prong of a prima facie case of selective prosecution. The complaint is void of any substantive allegation that he is being singled out for prosecution when compared to other similarly situated doctors. No examples or specific instances of such selective prosecution are given. Plaintiff's only such allegation is a conclusory statement made in his complaint alleging that he was being singled out for prosecution (Compl. paragraph 9). Such a conclusory (33) allegation standing alone is not enough to withstand a motion to dismiss because complaints based on civil rights statutes must include specific allegation of facts showing a violation of rights "instead of a litany of general conclusions that shock but have no meaning." *Barr v. Abrams*, 810 F.2d 358, 363 (2d. Cir. 1987). Accordingly, defendant's motion to dismiss plaintiff's equal protection claim is granted.

Transcript Decision of U.S. District Court, Northern District of New York dated May 9, 1994

I guess we have a proper order in the file.
Thank you both.

(34) CERTIFICATION

I, Mary Louise Stasolla, a Shorthand Reporter and Notary Public in and for the State of New York, hereby certify that the transcript to which this certificate is annexed is a true and accurate record of the minutes of the proceedings herein, to the best of my knowledge and belief.

s/ Mary Louise Stasolla
MARY LOUISE STASOLLA

Order of U.S. District Court, Northern District of New York dated May 14, 1994.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GERALD MOSS, Ph.D., M.D.,

Plaintiff.

against

HARVEY BERNARD, M.D., Individually and in his Official Capacity as a State Participant Pursuant to Public Health Law §230,

Defendant.

ORDER
Civil Action No. 93-CV-1605
(McAvoy, J.)
(Smith, M.J.)

APPEARANCES:

JAMES E. DERING, ESQ.
Attorney for the Plaintiff
Gleason, Dunn, Walsh & O'Shea
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Albany, NY 12207

Order of U.S. District Court, Northern District of New York dated May 14, 1994

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Albany, NY 12224

JUDITH I. RATNER
Assistant Attorney General
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HONORABLE THOMAS J. McAVOY
Chief United States District Judge

Defendant having moved to dismiss this action and plaintiff having opposed the motion, and upon all pleadings and prior papers by and between the parties of this action, it is

Order of U.S. District Court, Northern District of New York dated May 14, 1994

ORDERED that defendant's motion to dismiss the complaint be and the same is in all respects hereby granted and judgment shall be entered by the Clerk dismissing the complaint and this action against the defendant.

DATED: May 14, 1994
Binghamton, New York

s/Thomas J. McAvoy
THOMAS J. McAVOY
CHIEF U.S. DISTRICT JUDGE

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
MAY 16 1994
AT ____O'CLOCK ____M.
GEORGE A. RAY, CLERK
BINGHAMTON

Judgment of U.S. District Court, Northern District of New York dated May 17, 1994.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GERALD MOSS, Ph.D., M.D.

v.

HARVEY BERNARD, M.D., Individually, and in his official capacity as a State Participant pursuant to Public Health Law §230,

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 1:93-CV-1605 (TJM-RWS)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Judgment of U.S. District Court, Northern District of New York dated May 17, 1994

IT IS ORDERED AND ADJUDGED; that Judgment is entered dismissing the Complaint and the above action is dismissed as against the Defendant Harvey Bernard, M.D.; as in accordance with Judge McAvoy's Order of May 14, 1994.

Date: May 17, 1994

s/George A. Ray
Clerk

s/P.T. Ashman
(By) Deputy Clerk

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
MAY 17 1994
AT ___O'CLOCK___M
GEORGE A. RAY, CLER
BINGHAMTON

Order of the State of New York, Court of Appeals dated March 30, 1995.

STATE OF NEW YORK

COURT OF APPEALS

3-10 Mo. No. 56

In the Matter of Gerald Moss,

Appellant,

v.

Mark R. Chassin, as Commissioner of the State of New York, Department of Health, *et al.*,

Respondents.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty day of March 1995

Present: HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Order of the State of New York, Court of Appeals dated March 30, 1995

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Levine took no part.

s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Opinion of the Appellate Division, Third Department Decided November 23, 1994.

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: November 23, 1994

IN THE MATTER

OF

GERALD MOSS,

Petitioner,

v.

MARY R. CHASSIN, as Commissioner of the State of New York Department of Health, *et al.*,

Respondents.

69162
MEMORANDUM AND JUDGMENT

Calendar Date: October 12, 1994
Before: Mikoll, J.P., Mercure, Crew III, White and Yesawich Jr., JJ.

Opinion of the Appellate Division, Third Department
Decided November 23, 1994

Gleason, Dunn, Walsh & O'Shea (Thomas F. Gleason of counsel), Albany, for petitioner.

G. Oliver Koppell, Attorney-General (Mark G. Peters of counsel), New York City, for respondents.

White, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Public Health Law § 230-c [5]) to review a determination of the Administrative Review Board for Professional Medical Conduct which revoked petitioner's license to practice medicine in New York.

In March 1989 and in October 1991, petitioner, a licensed physician who is internationally recognized as an expert in the field of enteral nutrition, was interviewed by the Office of Professional Medical Conduct (hereinafter OPMC) regarding its investigation of petitioner's treatment of five patients (hereinafter patients A, B, C, D and E) between 1983 and 1986. Thereafter, in August 1992, OPMC filed 10 specifications of professional misconduct against petitioner. Following a hearing, a Hearing Committee of the State Board of Professional Medical Conduct (hereinafter the Hearing Committee) found that petitioner was guilty of gross negligence in regard to his treatment of patients A, C and D; practicing medicine with negligence on more than one occasion with respect to his treatment of patients A, C, and D; and failure to maintain adequate medical records relative to patients A, B, C and E. Based on these findings, the Hearing Committee determined that petitioner's license to practice medicine should be limited to consultation to the exclusion of all other types of medical

practice. OPMC and petitioner appealed to the Administrative Review Board for Professional Medical Conduct (hereinafter the Review Board). It sustained the Hearing Committee's findings but overruled the penalty it had levied, imposing instead the penalty of revocation of petitioner's license. Petitioner then commenced this CPLR article 78 proceeding.

As part of his challenge to the Review Board's determination, petitioner has raised several arguments under the rubric of denial of due process. The first is that his due process rights were violated by OPMC's delaying until 1992 to issue the charges against him. This argument is unavailing unless petitioner can show that he sustained actual prejudice as a result of the delay (*see, Matter of Cortlandt Nursing Home v Axelrod,* 66 NY2d 169, 180, *cert denied* 476 US 1115; *Matter of Matala v Board of Regents of Univ. of State of N.Y.,* 183 AD2d 953; *Matter of Rojas v Sobol,* 167 AD2d 707, *lv denied* 77 NY2d 806). Petitioner claims that he delay had an adverse impact upon him since the pathologist who performed the autopsy on patient A died before the hearing and certain records relating to patients B and D had been lost. We disagree since the pathologist's testimony regarding the cause of patient A's death would have had little relevance to the charge that petitioner had inappropriately discharged her from the hospital following her operation and that he had inadequately evaluated and treated her thereafter (*compare, Matter of Sharma v Sobol,* 188 AD2d 833). Likewise the information purportedly contained in he lost documents would have had a minimal impact on the hearing. Thus, we find that petitioner has not sustained this argument.

Petitioner's next argument is that he was denied a fair hearing because the doctors who conducted the interview, afforded him

under Public Health Law § 230 (10) (a) (iii), were biased. He further argues that the Hearing Committee was biased because its Chair was acquainted with OPMC's expert witness. Merely alleging bias is not enough to set aside an administrative determination (*see, Matter of Jeremias v Sander,* 177 AD2d 488). Instead, there must be a factual demonstration supporting the allegation and proof that the outcome flowed from it (*see, Matter of Hughes v Suffolk County Dept. of Civ. Serv.,* 74 NY2d 833, 834; *Matter of Warder v Board of Regents of Univ. of State of N.Y.,* 53 NY2d 186, 197).

Here, there is no proof that the doctors' alleged bias infected the Hearing Committee or the Review Board, thereby disabling those bodies from hearing and deciding this matter on the basis of the evidence presented at the hearing (*see, B.A.M. Brokerage Corp. v State of New York,* 718 F Supp 1195). Nor did petitioner establish that the integrity of the Hearing Committee was compromised by its Chair's acquaintance with OPMC's expert witness since he did not come forward with proof overcoming the presumption of honesty and integrity which is accorded to members of administrative bodies (*see, Matter of Rine v City of Sherrill,* 195 AD2d 961, *lv denied* 82 NY2d 660; *Matter of Amarnick v Sobol,* 185 AD2d 485; *Matter of Reisner v Board of Regents of Univ. of State of N.Y.,* 142 AD2d 22). For those reasons, we find that petitioner was not denied due process on the ground that he was denied an impartial hearing.

Petitioner urges us to apply the holding of *Matter of McBarnette v Sobol* (83 NY2d 333) to this case in light of the denial of his request to examine OPMC's files so he could ascertain the first date upon which it had considered charges against him. We decline to do so since the record discloses that

petitioner was not seeking the requested information for the purpose of cross-examining complainants who had testified at the hearing, but rather was seeking to utilize the information to bolster his claim of excessive delay (*see, id.*, at 341). Moreover, we have held that *Matter of McBarnette v Sobol (supra)* is not to be applied retroactively except possibly in certain limited circumstances not present here (*see, Matter of Finelli v Chassin*, ___ AD2d ___, 614 NYS2d 634).

Aside from his due arguments, petitioner contends that the Review Board's determination is not supported by substantial evidence. Prefatorily, we note that the proper standard of review here is whether the determination was arbitrary and capricious, affected by an error of law or an abuse of discretion (*see, Matter of Finelli v Chassin, supra; Matter of Rudell v Commissioner of Health of State of N.Y.*, 194 AD2d 48, 50, *lv denied* 83 NY2d 754). Under this test, the inquiry is whether the administrative determination has a rational basis that is supported by fact (*see, Matter of Pell v Board of Educ.*, 34 NY2d 222, 231). In making this inquiry, we do not resolve credibility issues or weigh the testimony of the expert witnesses, for these issues are solely within the province of the administrative factfinder (*see, Matter of Santasiero v Sobol*, AD2d 835, *lv denied* 83 NY2d 754; *Matter of Briggs v Board of Regents of Univ. of State of N.Y.*, 188 AD2d 836. *lv denied* 81 NY2d 708).

Applying these principles here, we find there is ample evidence supporting the Review Board's findings that petitioner inappropriately discharged patients A, C and D and inadequately treated and evaluated patients A and C. Its finding that petitioner maintained inadequate medical records with regard

to patients A, B, C and E also has factual support. Hence, we conclude that the Review Board's determination of guilt is not arbitrary and capricious.

The final issue raised by petitioner is that the penalty of revocation was unfairly imposed because the Hearing Committee refused to allow full testimony regarding his accomplishments and studies on surgical innovation. We reject this contention for the record discloses that petitioner was permitted to adduce his academic credentials and his 38-page curriculum vitae. In any event, petitioner's emphasis on his accomplishments overlooks the fact that a physician's foremost obligation is to his or her patients. Thus, when a physician fails in this obligation to the extent petitioner did, we cannot say that the penalty of revocation is shocking to one's sense of fairness (*see, Matter of Santasiero v Sobol, supra; Matter of Golan v Sobol,* 195 AD2d 634, *lv denied* 82 NY2d 661).

Accordingly, for the foregoing reasons, we shall confirm the determination.

Mikoll, J.P., Mercure, Crew III and Yesawich Jr., JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

/s/Michael J. Novack
Michael J. Novack
Clerk of the Court

(2)

No. 94-1944

Supreme Court, U.S.
FILED
JUN 21 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

GERALD MOSS, Ph.D., M.D.,

Petitioner,

against

HARVEY BERNARD, M.D., Individually, and in his Official Capacity as a State Participant pursuant to Public Health Law Section 230,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: June 15, 1995

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Counterstatement of Questions Presented

1. Whether plaintiff's failure to raise in the district court the issue of defendant's alleged denial of his right to substantive due process in connection with the revocation of plaintiff's license to practice medicine in New York precludes his contention on appeal that this issue was not collaterally estopped by a state court determination that the revocation of plaintiff's license comported with due process.

2. Whether, in this action pursuant to 42 USC § 1983, this Court should grant certiorari to review a decision of the United States Court of Appeals for the Second Circuit that the doctrine of collateral estoppel precludes the present due process challenge to the revocation of plaintiff's license to practice medicine in New York, when a state appellate court determined in a prior proceeding that defendant's alleged actions had neither amounted to nor induced a deprivation of plaintiff's due process rights.

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No. 94-1944

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GERALD MOSS, Ph.D., M.D.,

Petitioner,

-against-

HARVEY BERNARD, M.D., Individually, and in his Official Capacity as a State Participant pursuant to Public Health Law Section 230.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

The Statutory Scheme for Dealing with Professional Medical Misconduct

The New York State Board for Professional Medical Conduct ("the Board") is empowered to "investigate on its own any suspected professional misconduct" of medical licensees, and required "to investigate each complaint [of such misconduct] received regardless of the source." NY Pub Health L § 230(10)(a) (McKinney 1990). The investigation is conducted by an "investigation committee," consisting of two physicians and one lay member appointed by the Board chairperson. *Id.* § 230(5), (6), (10)(a)(iii). When a case has been referred to an investigation committee, the physician being investigated is afforded "an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation." *Id.* § 230(10)(a)(iii). "Providing an opportunity for" this interview, at which the licensee may have counsel present, is "a condition precedent to the convening of an investigation committee on professional misconduct." *Id.*

If, after investigating, the majority of the investigation committee concludes that a hearing is warranted and the Director of the Office of Professional Medical Conduct, after consultation with the Executive Secretary of the Board, agrees, the Director directs counsel to prepare charges against the physician. *Id.* § 230(10)(a)(iv). These charges must state "the substance of the alleged professional misconduct" and "the material facts . . . by which the charges are to be proved." *Id.*

§ 230(10)(b). The filing of charges triggers a hearing before a committee on professional conduct, composed (like the investigation committee, although with different personnel) of two physicians and a lay person. *Id.* § 230(6)(10)(e). The hearing is conducted by this committee and an administrative officer, who is designated by the Commissioner of Health and who rules on motions and other legal issues, but is not entitled to vote. *Id.* § 230(10)(e). The charged physician has the right, *inter alia*, to appear personally at the hearing, to be represented by counsel, to produce witnesses and evidence, to cross-examine adverse witnesses, and to have subpoenas issued in his behalf. *Id.* § 230(10)(c), (f).

Within thirty days of the hearing, the hearing committee is required to make findings of fact and conclusions concerning the charges, and (if the charges are sustained) to recommend a penalty. *Id.* § 230(10)(g). The hearing committee's conclusions and recommendations must be made by a majority of the committee. *Id.* The committee issues an order based on its determination, which may then be reviewed by the Administrative Review Board for Professional Medical Conduct ("the Review Board"). *Id.* § 230(10)(i). Either the charged physician or the New York Department of Health may seek review from this five-member Board, which consists of three physicians and two lay members. *Id.* § 230-c(2), (4)(a). The Review Board reviews "whether or not the determination and the penalty are consistent with the findings of fact and conclusions of law and whether or not the penalty is appropriate." *Id.* § 230-c(4)(b). The Review Board's determinations are "based upon a majority concurrence" of the Review Board. *Id.* § 230-c(4)(c). An order of the Review Board is subject to judicial review by means of a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. *Id.* § 230-c(5). Such a proceeding is commenced in the Appellate Division, Third Department. *Id.*

The Present Action

On December 27, 1993, plaintiff Gerald Moss ("plaintiff") commenced the present action pursuant to 42 USC § 1983 in the United States District Court for the Northern District of New York (4).[1] Plaintiff identified himself as "a physician formerly licensed to practice medicine in the State of New York," against whom a licensure proceeding concerning his surgical care of patients was brought, eventually resulting in a decision of a hearing committee that plaintiff had engaged in medical misconduct and a determination by the Review Board that plaintiff's license to practice medicine be revoked (5, 17).

According to plaintiff, the source of this allegedly unlawful revocation was not his own misconduct. Nor was it anything done, individually or collectively, by the five members of the Review Board, the three members of the hearing committee, the three members of the investigation committee, or the Director of the Board—by, in other words, anyone charged with making the decisions that led to this revocation. Rather, the sole defendant was Harvey Bernard, M.D. According to plaintiff, Dr. Bernard was one of two physicians designated to interview plaintiff pursuant to NY Pub Health L § 230(10)(a)(iii) in order to receive "an explanation of the issues under investigation" (5-6). In plaintiff's view, a "personal vendetta" between himself and Dr. Bernard led the latter "inappropriate[ly]" and "malicious[ly]" to "interjec[t]" himself into the disciplinary review process in order to injure plaintiff (6-8). Plaintiff alleged that Dr. Bernard "made or heavily influenced" the decision of the investigation committee and the Director to bring "formal medical misconduct charges" against plaintiff (8). This supposedly intentional and

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[1]Parenthetical citations are to the Joint Appendix filed by the parties in the court below.

malicious conduct, plaintiff alleged, was "fatal to a surgical innovator such as plaintiff," who—although by his own account nationally famous for his "innovative techniques" (13-17)—would then have these techniques scrutinized at a committee hearing "by physicians lacking sufficient specialized surgical expertise" because they were "not educated in currently accepted, evolving state-of-the-art surgical practice" (13-14).[2] Although the complaint did not allege either that Dr. Bernard participated on behalf of the Board at any formal stage of the disciplinary proceedings after the interview or that he testified at the hearing, he was alleged "to have misled others functioning as State participants" in the disciplinary process by mischaracterizing the nature of the surgery at issue and "choosing a retired physician to act as an expert witness against plaintiff" (18-19).

Plaintiff alleged that Dr. Bernard's "involvement in the review of medical care provided by plaintiff was undertaken with malevolence toward plaintiff," causing him harm and depriving him "of property and liberty interests without due process of law" (21). He sought compensatory damages, punitive damages, and attorney's fees pursuant to 42 USC § 1988 (22-23). In addition, having contended that "the practicing physicians" who decided his case were "uninformed as to [his] techniques and standing as an innovator" and thus lacked sufficient "educat[ion]" to judge his practices (13-14), plaintiff demanded a jury trial (4).

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[2]In an earlier case, the New York State courts found reasonable the conclusion of the Albany Medical Center Hospital that plaintiff's surgical practices violated accepted professional standards. See, Moss v Albany Medical Center Hospital, 61 AD2d 545 (3d Dept 1978).

The State-Court Proceeding

Before commencing the present action, plaintiff had begun a parallel state-court proceeding commenced pursuant to NY Pub Health L § 230-c(5) in the Appellate Division, Third Department. Like the present action, the state proceeding arose from the facts that a hearing committee of the Office of Professional Medical Conduct determined that plaintiff was guilty of gross negligence in his treatment of certain patients and that the Administrative Review Board for Professional Medical Conduct sustained this finding on appeal and revoked plaintiff's license to practice medicine in New York.

In this state-court proceeding, plaintiff raised an issue similar to the issue raised in the present action. In his verified petition and brief in state court, plaintiff alleged certain "due process objections" with respect to Dr. Bernard's alleged conduct, claiming that Dr. Bernard's "prejudice" against plaintiff deprived him of "a real opportunity to participate in the interview." In his main brief in state court, plaintiff argued that the involvement of the supposedly "biased" Dr. Bernard, as one allegedly "charged with recommending . . . whether or not charges should be brought" against plaintiff, meant that due process required annulment of the Hearing Committee's determination.

Decision of the District Court

While the state-court proceeding was still pending, Dr. Bernard moved in the district court to dismiss the complaint pursuant to Fed R Civ P 12(b)(6) on the ground, *inter alia,* that it failed to state a claim for relief. On May 9, 1994, the district court (McAvoy, J.) issued an oral decision granting the motion to dismiss (31). The court acknowledged its obligation, on a motion to dismiss on the pleadings, to assume as true the facts

alleged by plaintiff and to construe a complaint liberally and favorably to the plaintiff, requiring only that plaintiff make "a short and plain statement of the claim showing that the pleader is entitled to relief" (31-32, *quoting* Fed R Civ P 8[a]). Even under this lenient standard, the court found that plaintiff could "prove no set of facts which would entitle him to relief" (32).

The district court noted that its role in reviewing a State's revocation of a medical license is limited to determining whether the State had provided adequate avenues for redress and review of an arbitrary revocation (33-34). Summarizing the many layers of state administrative and judicial protection available to plaintiff and observing that plaintiff had invoked all of them, including judicial review, the court concluded that "[t]he disciplinary process . . . does indeed provide plaintiff with all the process that's due" (34-36). Even "assuming for the sake of this motion that defendant did indeed interview plaintiff with malicious intent," the court found it "plain that the state has satisfied the minimum fundamental requirement of due process," for it was likewise "clear that plaintiff had numerous opportunities at various stages of the administrative proceedings to bring to light all the plaintiff's concerns about the improprieties of the initial interview with the defendant" (38). Nor was it significant that plaintiff had "attempted to demonstrate that the defendant not only tainted the initial interview, but also tainted all of the subsequent hearings by misleading and mischaracterizing the evidence presented during the initial interview" (39). This argument, the court said, was "groundless because even assuming, arguendo, that the defendant did, in fact, act improperly during the initial interview, plaintiff had an ample opportunity to address those concerns to the committees in subsequent hearings and reviews," and plaintiff had not alleged "that the Committee[s] in any way denied him such an opportunity" (39).

Thus, regardless of how liberally the complaint was construed, "plaintiff ha[d] failed to allege that his due process rights were violated" (41).

Decision in the State-Court Proceeding

On November 23, 1994, the Appellate Division, Third Department confirmed the administrative determination against petitioner and expressly rejected plaintiff's due process claims made on the basis of Dr. Bernard's alleged conduct. The Appellate Division recognized that these claims were "raised . . . under the rubric of denial of due process" and noted that "there must be a factual demonstration supporting the allegation" of bias against Dr. Bernard "and proof that the outcome [challenged by plaintiff] flowed from it" (28a).[3] In the Appellate Division's view, because there was no indication that Dr. Bernard's "alleged bias infected the Hearing Committee or the Review Board, thereby disabling those bodies from hearing and deciding this matter on the basis of the evidence presented at the hearing," plaintiff "was not denied due process" (28a).

The Decision Below

By the time of the Appellate Division's decision in the state-court proceeding, the parties had fully briefed the appeal of the present action in the United States Court of Appeals for the Second Circuit. Because of the identity between the due process issue raised in the state-court proceeding on the basis of Dr. Bernard's alleged conduct and the due process claim asserted directly against Dr. Bernard in the case at bar, Dr. Bernard sought and was granted permission to file a supplemental brief

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[3]Parenthetical citations followed by "a" are to the Appendix to the petition herein.

indicating that relitigation of the due process issue in the present action was barred by the doctrine of collateral estoppel.

On February 24, 1995, the Second Circuit issued an unpublished "summary order" affirming the judgment of the district court. The court noted that plaintiff "is collaterally estopped from bringing his federal suit because the issues raised in the complaint have been resolved in a parallel state court decision rendered since the complaint was dismissed" (2a). The Third Department's decision, the court below said, "disposes of [plaintiff's] procedural and substantive due process claims" (2a). According to the Second Circuit, "[b]ecause the state court's decision determines that the decision to revoke [plaintiff's] license was not 'arbitrary or irrational or motivated by bad faith' [cit om], it collaterally estops [plaintiff] from bringing a procedural or substantive due process claim in federal court" (3a).

The court below affirmed the district court's judgment "without prejudice to [plaintiff's] moving to reopen should the New York Court of Appeals overturn the Appellate Division's decision" (3a). On March 30, 1995, the New York Court of Appeals denied plaintiff's motion for leave to appeal in the state-court proceeding (24a), thus concluding his state-court challenge in connection with the revocation of his medical license.

REASONS FOR DENYING THE WRIT

Because plaintiff did not raise the issue of substantive due process in the district court, he may not make it the basis of his petition for certiorari. Even if the issue is preserved for this Court's review, and even if every allegation of the complaint is credited, plaintiff raises no issue of general importance meriting this Court's scrutiny. Nor, in any event, did the court below err

in dismissing the complaint because plaintiff is collaterally estopped by a prior state court judgment from raising the issues he attempts to raise.

POINT I

Plaintiff did not raise the issue of substantive due process in the district court.

The issue of substantive due process, which forms the sole basis for plaintiff's claim that the state-court proceeding did not have a preclusive effect on the present action, was never raised in the district court. Only on appeal did plaintiff contend that the "due process" component of his complaint had a substantive element instead of or in addition to its apparently procedural basis. Having failed in the district court to raise the issue of violation of his substantive due process rights, plaintiff cannot now premise a petition for certiorari on the continued viability of such an issue in the wake of the state-court proceeding.

It cannot be seriously contended that the complaint sounds in substantive due process. In his memorandum of law in the district court—the only document by which plaintiff was entitled to explain the gravamen of his complaint on this motion pursuant to Fed R Civ P 12(b)(6)—plaintiff makes clear that he is attempting to state a cause of action for *procedural* due process. Neither the term "substantive due process," the concept it betokens, nor any cognate terms or concepts appear in this brief any more than they appear in the complaint. Instead, plaintiff's entire discussion of his "due process" claim makes clear that the claim is strictly procedural in its nature. According to plaintiff:

> The defendant correctly cites that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," [cit om], and that a due process violation occurs if an individual is "denied a fair forum for protecting his state rights." [Cit om].
>
> The denial of a fair and meaningful opportunity to be heard is exactly what Dr. Moss alleges in that he submits, among other things, that the defendant: purposefully interjected himself into the review process for the sole purpose of injuring Dr. Moss; knowingly performed a biased review of plaintiff's patient care; chose a retired "expert" who was not qualified to review the specialized, innovative procedure at issue; wrongfully made or heavily influenced the decision that formal medical misconduct charges should be brought for reasons unrelated to the patient care under review; misled other State participants by categorizing the specific patient care at issue as routine surgery rather than procedures involving innovative techniques, the review of which required special knowledge, including, but not limited to, Critical Care; and based on the above tainted all further review of the allegations against Dr. Moss. (Memorandum of Law pp 12-13.)

The claim that plaintiff has been denied "a fair and meaningful opportunity to be heard," which according to plaintiff is "exactly" what he asserts, sounds exclusively in procedural due process. This Court has carefully distinguished between the "substantive component" of the due process clause, which "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,'" and procedural due process, which is "a guarantee of fair procedure."

Zinermon v Burch, 494 US 113, 125 (1990) (*quoting Daniels v Williams*, 474 US 329, 331 (1986)). By his own account in the district court, plaintiff's due process claim is of the latter sort.

This means that plaintiff cannot raise a substantive due process claim at any subsequent stage of the case. It is well established that a claim not raised in the district court cannot be raised for the first time on appeal. *See, e.g., Yee v City of Escondido*, ___ US ___, 112 S Ct 1522, 1524, 118 L Ed 2d 153 (1992) (on appeal from state court, substantive due process claim "is not properly before this Court because it was not raised below or addressed by the state courts"). Obviously, a plaintiff cannot assert a dubious claim for "due process," lead the district court and his opponent to regard it as based on his procedural rights, and then, when his complaint is dismissed for its insufficiency, contend on appeal that the decision below is incorrect. But that is precisely what plaintiff now attempts.

As one federal court has succinctly observed, a claimant "cannot expect to lose in the trial court on one theory but win on appeal under another." *Browzin v Catholic University of America*, 527 F2d 843, 850 n 10 (DC Cir 1975). By plaintiff's own account, the sole question entitling him to review by this Court is whether the issue of substantive due process in the present case remains viable in light of the preclusive effect of the state-court decision on "due process." The substantive due process issue, however, was never raised in the district court. Accordingly, it cannot serve as the basis for the present petition, and the writ of certiorari should be denied.

POINT II

The court below correctly concluded that the state-court decision collaterally estops plaintiff's substantive due process claim.

Evidently eager to dispose of plaintiff's specious case as simply as possible, the court below assumed *arguendo* that the complaint stated a claim for violation of plaintiff's substantive due process rights and concluded that the Appellate Division's decision "collaterally estops [plaintiff] from bringing a procedural or substantive due process claim in federal court" (3a). It is not clear how this unpublished decision, which may "not be cited or otherwise relied upon in unrelated cases" in any court (3a), can possibly have the "far reaching implications" (Petition, p 17) that (according to plaintiff) compel a grant of certiorari. But the Second Circuit's decision was in any event simply and straightforwardly based on well-established law, and requires no review by this Court.

In determining the preclusive effect to be given a state court judgment, a federal court must give that judgment the same effect it would have in the courts of that state under state law. *Allen v McCurry*, 449 US 90, 96 (1980); *see* 28 USC § 1738 (1994). Under New York law, "[a]pplication of the doctrine of collateral estoppel requires a finding of 'the identicality of an issue necessarily decided in the prior action' and 'a full and fair opportunity to contest the issue in the prior action.'" *Benjamin v Coughlin*, 905 F2d 571, 575 (2d Cir) (*quoting Halyalker v Board of Regents*, 72 NY2d 261, 266 (1988)), *cert denied*, 498 US 951 (1990). As plaintiff notes (Petition, p 18), a substantive due process claim entails a contention that the government action at issue is substantively and deliberately arbitrary, notwithstanding the fairness of the procedures that

implement it. *Daniels v Williams*, 474 US 327, 331 (1986). As the Second Circuit recognized (2a-3a), the state court decision for which preclusive effect is claimed held squarely that the administrative determination to revoke plaintiff's license to practice medicine "ha[d] a rational basis that [was] supported by fact" and was not "arbitrary and capricious, affected by an error of law or an abuse of discretion" (29a-30a). Thus, the Second Circuit concluded, "[b]ecause the state court's decision determines that the decision to revoke [plaintiff's] license was not 'arbitrary or irrational or motivated by bad faith,' [cit om], it collaterally estops [plaintiff] from bringing a procedural or substantive due process claim in federal court" (3a).

Plaintiff challenges this straightforward application of the doctrine of collateral estoppel by suggesting that he lacked a full and fair opportunity to litigate his substantive due process claim in state court. By plaintiff's own account, this is untrue. It is well established that a proceeding pursuant to Article 78 of the New York Civil Practice Law to challenge an administrative determination may encompass a substantive due process claim. *See, e.g., Colton v Riccobono*, 67 NY2d 571, 577 (1986); *Alfonso v Fernandez*, 195 AD2d 46, 56-59 (2d Dept 1993); *Village Bd. of Trustees of Village of Malone v Zoning Bd. of Appeals*, 164 AD2d 24, 28 (3d Dept 1990). Plaintiff's petition in the state court proceeding expressly raises what he characterized as "due process issues" with respect to Dr. Bernard's supposed "prejudic[e]" against him. If (as plaintiff contends) such an undifferentiated "due process" claim is sufficient to raise issues of both procedural and substantive due process in his federal complaint, then it is likewise sufficient to do so in his state court petition. He raised the issue either in both venues or in neither of them.

In addition, the Article 78 proceeding brought by plaintiff in state court expressly involves a judicial determination of whether an administrative determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion." NY Civ. Prac. Law § 7803(3) (McKinney 1994). This is obviously no different from a constitutional determination, made under the rubric of due process, as to whether substantive government action was unconstitutionally arbitrary or irrational. And indeed, the Second Circuit has recognized that "rational basis" review under NY Civ. Prac. Law § 7803 is the equivalent of a determination of a substantive due process claim asserted by a plaintiff in a federal action pursuant to 42 USC § 1983. *See, Fay v South Colonie Central School Dist.*, 802 F2d 21, 30 (2d Cir 1986); *Gargiul v Thompson*, 704 F2d 661, 666 (2d Cir 1983), *vacated on other grounds*, 465 US 1016 (1984).

Thus, as the Second Circuit recognized, plaintiff was entitled to raise and the state court empowered to decide his substantive due process claim. The Appellate Division's determination that the challenged state action was not arbitrary and capricious disposed of this issue not only in the state court proceeding but in all subsequent cases, including the present one, in which it might be raised. Plaintiff argues (Petition, pp 26-29) that there can be no collateral estoppel effect for the state court judgment in the present case because "a New York plaintiff is not barred from seeking damages on a civil rights claim in federal court even by reason of a prior judgment on the facts in an Article 78 proceeding." While this is true, *see, e.g., Davidson v Capuano*, 792 F2d 275 (2d Cir 1986), it is a dimension of the law of *res judicata*, or claim preclusion, rather than collateral estoppel, or issue preclusion. Whereas *res judicata* "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated," collateral estoppel "refers to the effect of a

judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra v Warren City School Dist. Bd. of Educ.*, 465 US 75, 77 n 1 (1984). Thus, while *res judicata* does not bar a later claim in a § 1983 action when the claim itself could not have been asserted in a prior state court proceeding based on the same underlying facts, collateral estoppel *does* bar issues raised in a § 1983 action which were "previously litigated in the course of an Article 78 proceeding." *Davidson*, 792 F2d at 278, 282. The issue of substantive due process, insofar as plaintiff raises it at all in the case at bar, was raised and resolved in his prior state court proceeding, and is thus subject to preclusion under the doctrine of collateral estoppel.

Plaintiff further errs in contending that a due process violation can occur even if there is no deprivation of a liberty or property interest. He purports (Petition, p 20) to seek not "a review of the propriety of license revocation," as undertaken by the Appellate Division, but "a review of the fundamental unfairness of the initial interview procedure." A claim for denial of substantive due process, however, like one for denial of procedural due process, must be supported by an allegation that plaintiff has been deprived of a constitutionally-protected liberty or property right. *See, e.g., Board of Regents v Roth*, 408 US 564, 576-77 (1972). Plaintiff has no constitutional liberty or property right simply in an "unbiased" interview with Dr. Bernard. Indeed, by his own account (Petition, p 19) the constitutional rights at stake in the present case are plaintiff's liberty "to engage in any of the common occupations of life" and his "property right to his license to practice medicine."[4] It is precisely these rights,

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[4]The rights asserted by plaintiff cannot in any event support a substantive due process claim. Although a guarantee of procedural due process may lie with respect to any state-created right, substantive

(Continued on next page.)

however, that the state court, in concluding that "there is no proof that [Dr. Bernard's] alleged bias infected the Hearing Committee or the Review Board" which (unlike Dr. Bernard) adjudicated plaintiff's professional negligence and revoked his license (28a), decided were not infringed by Dr. Bernard. Plaintiff is not entitled to a federal-court determination on the identical issue. The point is not, as plaintiff claims, that Dr. Bernard threatens to "evade judicial review of his malicious conduct" (Petition, pp 25-26), but that the alleged conduct was unconnected with any deprivation of a property or liberty interest protected by substantive due process.

Thus, as the court below understood, plaintiff's substantive due process claim, even if it is deemed to have been made in the district court and every scurrilous and improbable allegation of the complaint is credited, was raised and resolved in plaintiff's prior state-court proceeding. Well-established principles of collateral estoppel therefore required that his complaint in the present action be dismissed. There is no reason for this Court to grant plaintiff a writ of certiorari in order to restate this unexceptionable conclusion.

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[4](Continued from previous page.)
due process generally protects only "'the individual's freedom of choice with respect to certain basic matters of procreation, marriage and family life.'" *Harrah Independent School Dist. v Martin*, 440 US 194, 198 (1979) (quoting *Kelley v Johnson*, 425 US 238, 244 (1976)). Plaintiff cites and defendant can locate no federal case in which the existence of a state-created licensing program was held to give rise to an interest protected by substantive due process.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
June 15, 1995

Respectfully submitted,

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